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Supreme Court, U.S.
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No. 85-684

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JUDITH KRAMER,

Petitioner,

and

BOARD OF EDUCATION OF THE TOWN OF BOONTON,
BOONTON EDUCATION ASSOCIATION,
NEW JERSEY EDUCATION ASSOCIATION,

and

PUBLIC EMPLOYMENT RELATIONS COMMISSION,

Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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December 18, 1985

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	1
ARGUMENT	6
1. *The Commission Did Not Rule on the Constitutional Merits, But It Believes the Statute is Constitutional. Its Statutory Rulings May Not Be Reviewed.*	6
CONCLUSION	8

TABLE OF AUTHORITIES

CASES:	PAGE
Champion v. Deukmejian, 738 *F.*2d 1082 (9th Cir. 1984), *cert. denied*, 105 *S.Ct.* 1230 (1985)	6
Johnson v. Robison, 415 *U.S.* 361 (1974)	6
Murdock v. Memphis, 87 *U.S.* 590 (20 Wall 1875)	6
Robinson v. New Jersey, 741 *F.*2d 598 (3d Cir. 1984), *cert. denied*, 105 *S.Ct.* 1228 (1985)	6
San Jose Teachers Ass'n v. Superior Court of Santa Clara County, 38 *Cal.*3d 839, 700 *P.*2d 1252, 215 *Cal. Rptr.* 250 (1985), *petition for cert. filed sub nom. Abernethy v. San Jose Teachers Ass'n*, 54 *U.S.L.W.* 3229 (U.S. Sept. 23, 1985) (No. 85-498)	6
STATUTES:	
N.J.S.A. 34:13A-5.5(c)	4
N.J.S.A. 34:13A-5.6	2
New Jersey Employer-Employee Relations Act, *N.J.S.A.* 34:13A-1 *et seq.*	2, 3

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BRIEF FOR THE RESPONDENT PUBLIC EMPLOYMENT RELATIONS COMMISSION OF NEW JERSEY

STATEMENT OF THE CASE

On November 30, 1981, Judith M. Kramer, a teacher, filed an unfair practice charge against the Board of Education of the Town of Boonton ("Board"), her employer, and an unfair practice charge against the Boonton Education Association ("Association"), her majority representative, and the New Jersey Education Association ("NJEA"), an Association affiliate, with the New Jersey Public Employment Relations Commission ("Commission"). Both charges challenged the legality and implementation of an agreement between the Board and the Association to deduct a representation fee from the paychecks of non-members of the Association (36-38a).[1]

On February 9, 1982, Kramer amended her charge against the Association and NJEA to claim that they violated constitutional guarantees of freedom of speech and association when they sought to enforce a representation fee system allegedly not limited to negotiations and contract administration costs (39a).

On May 17, 1982, the Director of Unfair Practices consolidated the cases and issued a Complaint and Notice of Hearing. Defendants filed Answers denying any statutory or constitutional violations (39-40a).

On September 13, 1982, Hearing Examiner Edmund G. Gerber conducted a hearing. At the outset, he quashed a subpoena duces tecum which would have required the Association and NJEA to produce all documents pertaining to the operation of the demand

and return system, calculation of the representation fee, computation of the refundable amount, and costs of collective negotiations, contract administration, and grievance processing from July 1980 to July 1982. He ruled that the Appeal Board established pursuant to *N.J.S.A.* 34:13A-5.6 had jurisdiction over challenges to the amount of representation fees and that the subpoenaed documents were not relevant to an unfair practice proceeding before the Commission. The parties then examined witnesses, introduced exhibits and filed briefs.

On March 25, 1983, the Hearing Examiner issued his report, H.E. No. 83-33, 9 *NJPER* 248 (¶14114 1983). He found that the Board, the Association and the NJEA violated the New Jersey Employer-Employee Relations Act, *N.J.S.A.* 34:13A-1 *et seq.*, when a representation fee was deducted for the month of September 1981 although the Association's demand-and-return system was not in place until October; he recommended a refund of the September fee with interest and a notice. He recommended the Complaint's dismissal in all other respects (40-41a).

Kramer, the Association and the NJEA filed exceptions (41-43a). The Commission granted, but Kramer then withdrew, a request for oral argument.

On July 18, 1983, the Commission issued its decision (36-84a). The Commission reviewed its jurisdictional limits and determined that the courts would decide the statute's constitutionality, the Appeal Board would decide challenges to representation fee amounts and impermissible expenditures, and the Commission would decide alleged unfair practices concerning statutory preconditions to deductions

(55-71a). Within its narrow statutory jurisdiction, the Commission held that the deduction of September 1981 dues was an unfair practice and found several other unfair practices. It found that the Association also violated the Act when it sent non-members ambiguous and misleading letters concerning membership; grudgingly responded to inquiries concerning the representation fee system (73-74a), and failed to notify each non-member personally of his rights and the applicable rebate procedures (75-76a). It found that the NJEA also illegally refused to allow non-members to pay their fees in an advance lump sum (76-78a). The Commission dismissed the remaining allegations.

Petitioner has misstated some of the Commission's holdings.

The Commission did not find that the statute "authorized as the exclusive [rebate] procedure the union's internal demand-and-return system." (7p). Rather the Commission held that a rebate procedure, given at least a 15% advance reduction, would be statutorily permissible provided the majority representative bore the burden of proof, the review proceedings were fair and full and the proceedings recognized a right of appeal to the Appeal Board. The Commission declined to determine whether this procedure excluded immediate recourse to the courts for fee challenges (68-69a, n. 28).

Nor did the Commission reject petitioner's contention that due process required pre-taking proceedings (7p). Rather the Commission declined to pass on any constitutional issues (69-70a).

Nor did the Commission find the legislature specifically authorized compelled support of lobbying "to secure advantages *in addition* to those secured through its collective negotiations with the public employer." (7p). Rather *N.J.S.A.* 34:13A-5.5(c) (95-96a) authorizes lobbying "to secure advantages *in wages, hours and other conditions of employment* in addition to those secured through collective negotiations with the public employer." (Emphasis added). This wording links the employees' vital interests in fundamental terms and conditions of employment with the action necessary to advance those interests (25-26a).[2]

Kramer appealed. The New Jersey Supreme Court certified the matter (3a).

On June 25, 1985, the New Jersey Supreme Court modified and affirmed the Commission's judgment (2-34a). The court affirmed all the Commission's statutory, jurisdictional and procedural rulings, but added these narrowing statutory constructions in light of the constitutional arguments: (1) lobbying supported by representation fees must be relevant to the occupational interests of unit employees (28-29a), (2) the annual representation fee must exclude the percentage of the prior year's budget attributable to non-chargeable expenses, and (3) any demand-and-return system must be simple, efficient and accessible. Given the Commission's statutory rulings and its own, the court held the statute facially constitutional (34a).

Petitioner has misstated one of the supreme court's holdings. Petitioner states that the supreme court left to union discretion the specific means to reduce the

risk of unconstitutional use of fees (9p); the implication is that this discretion will not be confined. The courts, however, will consider challenges to demand-and-return systems as applied (33-34a), the Appeal Board will review challenges to fee amounts and impermissible expenditures, and the Commission will find an unfair practice if a majority representative maintains its demand-and-return system unfairly, slowly or discriminatorily (72a, n. 31).

ARGUMENT

1. *The Commission Did Not Rule on the Constitutional Merits, But Believes the Statute is Constitutional. Its Statutory Rulings May Not Be Reviewed.*

An administrative agency must deem a statute it administers constitutional until the statute is finally declared unconstitutional and void. *Johnson v. Robison,* 415 *U.S.* 361 (1974). The Commission thus properly quashed Kramer's subpoena duces tecum and declined to pass upon her constitutional claims. Given that holding, the Commission will merely state its belief that the representation fee statute is facially constitutional for the reasons expressed by the New Jersey Supreme Court in this case and the Third Circuit Court of Appeals in *Robinson v. New Jersey,* 741 *F.*2d 598 (3d Cir. 1984), *cert. denied,* 105 *S.Ct.* 1228 (1985). *See also Champion v. Deukmejian,* 738 *F.*2d 1082 (9th Cir. 1984), *cert. denied,* 105 *S.Ct.* 1230 (1985); *San Jose Teachers Ass'n v. Superior Court of Santa Clara County,* 38 *Cal.*3d 839, 700 *P.*2d 1252, 215 *Cal. Rptr.* 250 (1985), *petition for cert. filed sub nom. Abernethy v. San Jose Teachers Ass'n,* 54 *U.S.L.W.* 3229 (U.S. Sept. 23, 1985) (No. 85-498).

The Commission also opposes certiorari to the extent any statutory interpretations might be challenged. These interpretations may not be reviewed. *Murdock v. Memphis,* 87 *U.S.* 590 (20 Wall 1875). Some of these statutory rulings—for example,

personal notice of rebate rights and procedures and reductions based on last year's budget—have the side effect of protecting non-members' constitutional interests.[3]

Finally, petitioner's arguments appear to rest in part on one unestablished premise: a union-controlled demand-and-return system is an obligatory and exclusive method for contesting a fee. The Commission declined to decide that issue (68-69a, n. 28) and perhaps a representation fee payer could go directly to court. Also, any demand-and-return system must culminate in an appeal to a tripartite Appeal Board with a strictly impartial chairman representing the public interest, and two other members representing employers and employee organizations. Finally, any demand-and-return system will, upon challenge, be scrutinized by the New Jersey courts to insure constitutional compliance, the Appeal Board to insure that the fee amount and expenditures are statutorily permissible, and the Commission to protect against statutory unfair practices.

CONCLUSION

The Commission did not rule on any constitutional claims, but believes the representation fee statute is constitutional. It also opposes certiorari to the extent, if any, its statutory rulings might be challenged.

Respectfully yours,

PUBLIC EMPLOYMENT
RELATIONS COMMISSION

By:
ROBERT E. ANDERSON, JR.
General Counsel

DATED: TRENTON, NEW JERSEY
December 18, 1985

FOOTNOTES

1. References to Petitioner's appendix are designated by "a," references to her petition by "p," and references to the Commission's appendix as "PERCa."

2. Nor was the Commission a defendant in the federal litigation (7p); only the Chairman was. The preliminary injunction did not apply to him and plaintiffs dismissed him (PERCai-iv).

3. The Commission agrees with the supreme court (31a) that the validity of the abandoned demand-and-return system is no longer an issue.

APPENDIX A-1

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
No. 82-1119 (DRD)

JOSEPH W. ANTONACCI, et al.;

Plaintiffs,

-v.-

STATE OF NEW JERSEY, et al.,

Defendants.

STIPULATION OF DISMISSAL

1. Plaintiffs filed a Complaint in the above matter against several defendants, including James W. Mastriani, Chairman of the New Jersey Public Employment Relations Commission.

2. Defendant Mastriani has filed an action for summary judgment.

3. Plaintiffs' attorney, Nelson R. Kieff, has agreed to dismiss defendant James W. Mastriani from this suit with prejudice.

4. Defendant Mastriani's attorney, Robert E. Anderson, Jr., has agreed in return to withdraw the motion for summary judgment.

PLAINTIFFS: JOSEPH W. ANTONACCI, MEVERIL JONES, THOMAS GAY, JOHN RUSSELL, RICHARD H. TREXLER, A. WILLIAM ONDER, LEON MATELSKI, EDWARD JAKUBCO, DOROTHY GRAY AND WILLIAM F. GRAY

BY: s/ Nelson R. Kieff,
NELSON R. KIEFF

DEFENDANT: JAMES W. MASTRIANI, CHAIRMAN, PUBLIC EMPLOYMENT RELATIONS COMMISSION

BY: s/ Robert E. Anderson, Jr.
ROBERT E. ANDERSON, JR.

APPENDIX A-2

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
No. 82-1118 (DRD)

PAUL H. ROBINSON, et al.,

Plaintiffs,

-v.-

STATE OF NEW JERSEY,et al.,

Defendants.

STIPULATION OF DISMISSAL

1. Plaintiffs filed a Complaint in the above matter against several defendants, including James W. Mastriani, Chairman of the New Jersey Public Employment Relations Commission.

2. Defendant Mastriani has filed a motion for summary judgment.

3. Plaintiffs' attorney, Nelson R. Kieff, has agreed to dismiss defendant James W. Mastriani from this suit with prejudice.

4. Defendant Mastriani's attorney, Robert E. Anderson, Jr., has agreed in return to withdraw the motion for summary judgment.

PLAINTIFFS: PAUL H. ROBINSON, CLIFFORD OWENS, PAUL B. KELLEY, ALLAN ROTH, CALVIN W. CORMAN, EARL MALTZ, ELIHU ABRAHAMS, ARNOLD GLASS, CHARLES W. UPTON, ALEX W. WYPYSZINSKI, MICHAEL CREW, HAROLD ZAPOLSKY, AND JACKSON TOBY

BY: s/ Nelson R. Kieff
NELSON R. KIEFF

DEFENDANT: JAMES W. MASTRIANI, CHAIRMAN, PUBLIC EMPLOYMENT RELATIONS COMMISSION

BY: s/ Robert E. Anderson, Jr.
ROBERT E. ANDERSON, JR.